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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 899.

STATE OF OHIO *ex rel.*, SIBARCO CORPORATION,
WALTER E. MISCHNICK,
Petitioners,

vs.

THE CITY OF BEREA, ALBERT M. McDONALD,
BUILDING COMMISSIONER OF THE CITY OF BEREA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Now comes Sanford W. Likover, on behalf of the petitioners, who respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled case on July 6, 1966, reversing the judgment in favor of the petitioners.

CITATIONS TO OPINIONS BELOW.

The Opinion of the Court of Appeals for the Eighth Judicial District of Ohio is unreported and is printed in the Appendix hereto (*infra*, pp. 13-15). The Opinion of the Supreme Court of the State of Ohio, printed in Appendix (*infra*, pp. 15-26), is reported in 7 Ohio State 2d 85.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on July 6, 1966 (Appendix, p. 27, *infra*). The motion for rehearing, timely filed, was denied on September 28, 1966 (Appendix, p. 27, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

The petition for a Writ of Mandamus filed in the Court of Appeals for the Eighth Judicial District of Ohio in the original action raised the Federal question as follows:

> "(17) Relators further say that the failure of the respondent, Albert M. McDonald, to grant a permit is arbitrary, unreasonable, confiscatory, and deprives relators of their property without due process of law in violation of the Constitution of the United States, Amendment 14, and in violation of Article 1, Sections 16 and 19 of the Constitution of the State of Ohio."

This action was tried before the Court of Appeals on an agreed statement of facts, briefs, and oral argument. The relator's brief raised the following questions of law:

> "QUESTIONS PRESENTED . . .
>
> "II. The relators were deprived of their rights to equal protection of the law under the Constitution of the United States, Amendment 14, and Article 1, Section 2 of the Constitution of the State of Ohio. . .
>
> "IV. The relators have been deprived of their property without due process of law in violation of the Constitution of the United States, Amendment 14, and Article 1, Sections 16 and 19 of the Constitution of the State of Ohio.
>
> "V. The relators were deprived of due process of law under the Constitution of the United States,

Amendment 14, and Article 1, Sections 16 and 19 of the Constitution of the State of Ohio, as the Planning Commission acted as a Board of Zoning Appeals."

The same questions of law were urged upon the Supreme Court of Ohio, when the respondents herein appealed to the Supreme Court as a matter of right. The Constitutional provisions involved are United States Constitution, Amendment 14; and Ohio Constitution, Article IV, Section 6.

QUESTIONS PRESENTED.

I.

Whether the Supreme Court of Ohio may deprive the petitioners, whose property is admitted to be unconstitutionally zoned, of the use of their property, by ignoring the Federal question and deciding the matter on a non-federal ground of State procedure and rejecting the constitutional procedure and remedy previously approved by said Court and followed by the petitioners?

II.

Whether the Supreme Court of Ohio may deprive the Ohio Courts of Appeals of their inherent discretion to hear mandamus under a constitutional grant of power (Ohio Const. Art. IV, Sec. 6) thereby depriving the petitioners of the equal protection of the law and due process?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Ohio Revised Code, Section 713.11, printed in the Appendix (*infra*, p. 29).

Ohio Revised Code Section 2505.07 printed in the Appendix (*infra*, p. 28).

U. S. Constitution, Amendment XIV, printed in the Appendix (*infra*, p. 28).

Ohio Constitution, Art. IV, Section 6, printed in the Appendix (*infra*, p. 27).

STATEMENT.

Petitioner Walter Mischnick is the owner of certain property in the City of Berea, part of which is under contract of sale to petitioner, Sibarco Corporation. From 1941 until November 10, 1952, petitioner Mischnick's property was zoned for Class 2-B, Retail and Commercial use. On November 10, 1952, a portion of petitioner Mischnick's property, together with other parcels, was zoned to Class 2-A Apartment Use. On December 12, 1954, most of the property which had been rezoned to Class 2-A Apartment Use on November 10, 1952, was zoned back to Class 2-B Retail and Commercial Use, excepting therefrom petitioner Mischnick's property and one other adjacent parcel. Until 1960, the Class 2-B Retail and Commercial Use Zone permitted the construction of gasoline or other oil filling stations. In 1960, the Council of the City of Berea amended its zoning ordinance and transferred all uses within Class 2-B, Retail and Commercial Use, except gasoline and oil filling stations into Class 2-B-1 and rezoned all Class 2-B properties into Class 2-B-1 Use. Class 2-B Use then constituted a classification for retail gasoline and oil filling stations only, without prescribing any standards.

Petitioner Mischnick's property together with that purchased under contract of sale by petitioner Sibarco Corporation fronted on the intersection of West Bridge Street, Henry Street, Westbridge Drive and Prospect Street. West Bridge Street and Prospect Street, immediately in front of and adjacent to the petitioner's parcel is designated as State Highway No. 237, which is further designated as an access route to the Ohio Turnpike. Directly across the street from the petitioner's property at the intersection of Prospect Street and West Bridge Street, including the entire frontage of approximately 675 feet on West Bridge Street to Rocky River Drive, was and is zoned Class 2-B-1, Retail and Commercial Use, and that the corner parcel of land is so zoned and immediately across the street from the petitioner's property is located a gasoline service station. The north side of West Bridge Street, immediately east of the petitioner's property and along the entire frontage of approximately 800 feet from Henry Street to Riverside Street, are parcels of land zoned Class 2-B-1, Retail and Commercial Use, which are improved with a substantial retail shopping center. The parcel of land at the southwesterly quadrangle of the intersection of West Bridge Drive a d Prospect Street is a parcel of land formerly zoned Class 2-B-1, Retail and Commercial, and presently zoned 2-A, Apartments, upon which is situated a gasoline service station. Immediately southwest of said service station property and within 200 feet of the petitioner's property and fronting on Prospect Street approximately 300 feet are other properties zoned Class 2-B-1, Retail and Commercial Use. The petitioner's property, thereby representing a triangular parcel of land, surrounded on two legs of the triangle by retail and commercial property and a state highway.

On October 29, 1963, the petitioners herein requested the Planning Commission and City Council of the respond-

ent City of Berea for reclassification of their property to Class 2-B, Retail and Gasoline Service Station zone. The Planning Commission of said respondent city refused to approve said reclassification. The petitioners' application was referred to the City Council. On July 20, 1964, after a public hearing at which residents objected to said reclassification ordinance, the Council of said respondent city brought the reclassification ordinance up for a vote and the Council refused to approve the proposed reclassification.

On September 3, 1964, petitioner Sibarco Corporation made a written application to the respondent, Albert M. McDonald, as Building Commissioner, to erect a gasoline service station on the property owned by the petitioners. Its application was accompanied by a detailed set of plans and specifications and was filed on forms provided by said respondent, Albert M. McDonald, pursuant to the Building Code of the respondent city. The plans and specifications complied in all respects with the Building Code of the respondent city.

On September 4, 1964, respondent Albert M. McDonald notified the petitioner, Sibarco Corporation, that its application for a building permit to erect a gasoline service station on the property it was purchasing, was denied solely on the ground that the land was not zoned for gasoline service stations, whereupon petitioner Sibarco Corporation appealed said action of the Building Commissioner to the Board of Zoning Appeals of the respondent city.

The Board of Zoning Appeals of the respondent city was identical in personnel with the Planning Commission that refused to approve the reclassification ordinance referred to above.

On September 21, 1964, the Board of Zoning Appeals, stating that it was not going to rehear the evidence, refused to authorize issuance of said building permit to the petitioners herein.

The petitioners herein then filed an original action in mandamus in the Court of Appeals for the Eighth Judicial District of Ohio under the provisions of Article IV, Section 6 of the Ohio Constitution. The respondents herein challenged the petition herein by demurrer which was overruled. The respondents herein then filed their answer to the petition for a Writ of Mandamus and an agreed statement of facts was filed (R. 10-19, inclusive).

In a hearing upon the merits (See Opinion, p. 15), the Court of Appeals found that the petitioners herein were entitled to a Writ of Mandamus upon the ground that the Zoning Ordinance of the City of Berea was unconstitutional as it applied to the petitioner's property and that the petitioners herein were denied the equal protection of the laws; that the zoning of the property for residential use has no tendency to promote the public health, safety, morals, convenience or general welfare, and bears no reasonable relation thereto, and as applied to such property is arbitrary, unreasonable, and beyond the zoning power.

The respondents herein appealed said decision as of right to the Supreme Court of the State of Ohio. The Supreme Court of the State of Ohio heard said appeal on March 1, 1966, and on July 6, 1966, reversed the Court of Appeals for the Eighth Judicial District on the ground that it has no discretion to issue a Writ of Mandamus in a zoning case. On July 14, 1966, the petitioners herein filed a motion for a rehearing. On September 28, 1966, the Supreme Court of the State of Ohio refused to grant a rehearing on this matter. On October 3, 1966, Chief Justice Kingsley A. Taft of the Ohio Supreme Court

granted a stay to allow the petitioners herein to file an application for a Stay of Mandate to this Court. This Court, on October 26, 1966 through the Honorable Justice Potter Stewart, granted a stay pending the timely filing of this petition.

REASONS FOR GRANTING WRIT.

The petitioners are deprived of the use of their property by the decision of the Supreme Court of Ohio in this case which evaded the Federal question and decided the case upon a non-Federal ground. This decision was clearly inconsistent with its previous decisions approving the form of the action and procedure followed by the petitioners herein (See Opinion, p. 15).

Prior to this decision, mandamus had been recognized by the Supreme Court of Ohio as an available remedy in obtaining a building permit where the zoning ordinance was unconstitutional as it applied to a petitioner's property. The Supreme Court of Ohio did not expressly rule on the petitioners' Federal constitutional rights but, nevertheless, it so disposed of these allegations so as to confer jurisdiction upon this Court. Actual determination by the State Court of the Federal question in terms is not required. *Lawrence v. State Tax Commissioner of Mississippi,* 286 U. S. 276, 282; *Dorchy v. Kansas,* 276 U. S. 306, 308-309; *Dewey v. Des Moines,* 173 U. S. 193, 199. Furthermore, the fact that a decision purports to rest upon State grounds does not preclude this Court from deciding whether Federal constitutional rights were, in fact, denied. *Williams v. Georgia,* 349 U. S. 375; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 681-682; *Davis v. Wechsler,* 263 U. S. 22; *Rogers v. Alabama,* 192 U. S. 226.

The Opinion below purports to decide this case upon non-federal grounds. Federal rights, however, may be denied as much by a refusal of a State court to decide questions as by its erroneous decision. *Lawrence v. Mississippi, supra.* This Court has held that review is warranted where Federal questions were fairly presented, where necessary to the determination of the cause, and there existed no adequate non-federal ground upon which the decision below would have been properly based. *Dorchy v. Kansas, supra; Erie Railroad Company v. Purdy,* 182 U. S. 148, 154; *Dewey v. Des Moines, supra; Roby v. Colehour,* 146 U. S. 153, 159-160.

This Court has, on numerous occasions, gone to the merits over obstacles unfairly imposed by State law (See *Rogers v. Alabama, supra; Williams v. Georgia, supra; Erie v. Thompson,* 337 U. S. 163; *Lawrence v. Mississippi, supra; Broad River Power Co. ex rel., Daniel,* 281 U. S. 537; *New York Central v. New York & Penn Co.,* 271 U. S. 124; *Ward v. Love County,* 253 U. S. 17). Mr. Justice Brandeis wrote in *Brinkerhoff-Faris Trust & Saving Co. v. Hill, supra*:

> "* * * While it is for the State courts to determine the adjective as well as the substantive law of the State, they must, and in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy unless there is, or was, afforded to him some real opportunity to protect it."

Under the provisions of R. C. Section 2505.07, Appendix (*infra,* p. 28), the petitioners here had ten (10) days from the denial by the respondent City's Board of Zoning Appeals to appeal to the Court of Common Pleas.

The reversal of the judgment of the Court of Appeals for the Eighth Judicial District of Ohio deprives the petitioners herein of all existing remedies for the enforcement of their rights in that the decision of the respondent City's Board of Zoning Appeals can no longer be appealed under R. C. Section 2505.07.

This Court held in *Staub v. Baxley,* 355 U. S. 313, that whether a pleading sets out a decision, right of action or defense founded on the Constitutional law of the United States, it is necessarily a question of Federal law; and, where a case coming from a State court presents that question, the United States Supreme Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the State court. In addition, this Court held that whether Federal Constitutional rights asserted by a litigant in a State court were given due recognition by that court, is a question to which the litigant is entitled to invoke the judgment of the United States Supreme Court, by way of an appeal thereto. It is then within the province of this Court to determine not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision that were without any fair or substantial support. In addition, it has been held that if there is no fair or substantial support in the facts for the State court's ruling on the State procedural ground, the Supreme Court can disregard it. *Ancient Egyptian Order v. Michaux,* 279 U. S. 737; *Creswil v. Knights of Pythias,* 225 U. S. 246.

The holdings in *Staub v. Baxley, supra; NAACP v. Alabama,* 357 U. S. 449, established that a new State rule cannot be invented for the occasion in order to defeat the

Federal claim. Further, in *Davis v. Wechsler, supra,* Justice Holmes stated:

> "Whatever springes the State may set for those who are endeavoring to assert rights which the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The Supreme Court has also inquired into the adequacy of State procedural grounds to determine whether the procedural application involved, although not unreasonably burdensome, was inconsistent and thus discriminated against a litigant attempting to raise a Federal claim. *Vandalia Railroad v. Indiana ex rel., City of South Bend,* 207 U. S. 359, 367; *Rogers v. Alabama, supra.*

In view of the rulings of the Ohio Supreme Court supporting the procedure followed by the petitioners herein, the language of this Court in *NAACP v. Alabama,* at pp. 457-458, is clearly applicable:

> "* * * [A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain Appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in State courts of their Federal Constitutional rights."

Accordingly, when an asserted Federal right is denied, the sufficiency of the grounds for denial is for this Court to decide. *Angel v. Bollington,* 330 U. S. 183, 189.

In summary, it is clear that the rule set forth in the Opinion of the Supreme Court of Ohio is clearly inconsistent with earlier State court treatment of the rule. In

this circumstance, the petitioners herein not knowing of the forthcoming change in the application of the procedural rule were unable to comply with it. This Court should not permit arbitrary invocation of a rule, apparently inapplicable under prior State decisions, to deprive it of the jurisdiction to consider the merits of the Federal claim asserted herein.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SANFORD W. LIKOVER,
Counsel for Petitioner.

December 21, 1966.

APPENDIX.

OPINION OF THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

(July 22, 1965.)

This is an original action brought in this court for the purpose of securing a writ of mandamus to compel The City of Berea to issue a building permit for the construction of a gasoline station by the Sibarco Corporation. The property on which the gasoline station is to be constructed was originally part of a tract of land zoned by regulations in three sections each having a different zoning classification. None of these classifications allows for the construction of a gasoline station. The property in question is located in Berea and is adjacent to West Bridge Street and Prospect Street, also known as State Highway No. 237. The property in question is located near heavily traveled Henry Street and West Bridge Drive. Most of the properties in the immediate vicinity are presently zoned 2BI classification. Gasoline stations require a 2B classification. There is a gasoline station immediately across the street from the parcel in question and another gasoline station immediately to the east of said parcel. Both these gasoline stations are on parcels classified as 2BI and have been given non-conforming use classifications.

The City of Berea has entered into negotiations with the State of Ohio for the possible relocation of State Route No. 237 under a plan designated "Berea 1975, a Guide for Community Action." The relocation of State Route No. 237 would necessarily involve a taking of a portion of the land in question.

10 *Ohio Jurisprudence* 2d, Section 360 on Constitutional Law at page 434 states:

> "A zoning ordinance which deprives owners of property the use of their property for certain specified purposes, while not depriving other owners of such use of property for similar purposes on substantially the same conditions, denies equal protection of the law."

In *State, ex rel. Euverard v. Miller*, 98 Ohio App. 283, 129 N. E. 2d 209, the court said in paragraph two of the syllabus:

> "Where property is situated at the intersection of two heavily traveled thoroughfares, in the midst of commercial establishments, and has little suitability for residential use, but rather is a prime business site, the zoning thereof for residential uses only has no tendency to promote the public health, safety, morals, convenience, or general welfare, and bears no reasonable relation thereto and, as applied to such property, is arbitrary, unreasonable and beyond the zoning power."

In *State, ex rel. Rosenthal vs. City of Bedford*, 74 Ohio Law Abs. 425, 134 N. E. 2d 727, the facts closely parallel those in the instant case. The Court of Appeals of Cuyahoga County held that "* * * where probability of use of property for residential purpose had been virtually destroyed by prior acquisition for highway and utility purposes and property was located at busily traveled intersections, both roads of which formed access highways to state turnpikes, and two corners of intersection were used for gasoline filling stations as conforming uses, owners of property had a clear legal right to erect gasoline stations on premises, notwithstanding residential zoning classification."

Again in *Henle vs. City of Euclid*, 97 Ohio App. 258, paragraph two of the syllabus states:

> "In passing a zoning ordinance, the city council should not be concerned with the question of whether or not the rule of supply and demand in the use to which the property owner desires to devote his property is amply served by others in like business in the community."

Even more pointed is paragraph three of the syllabus which is as follows:

> "A city cannot 'freeze' property thereby preventing the owner from improving it so that he may enjoy a beneficial use thereof only because the city may, in the future, need such property in constructing a freeway."

Upon the facts in this case we can reach no other conclusion but that Relators are entitled to the writ prayed for. Any other decision, under the evidence, would be in direct conflict with the cases cited herein.

For the foregoing reasons we find that the Relators have a clear legal right to the relief prayed for.

Writ to issue.

KOVACHY, *P.J.*, WASSERMAN, *J.*, SKEEL, *J.*, concur.

OPINION OF THE SUPREME COURT OF OHIO.

(July 6, 1966.)

1. The writ of mandamus must not be issued, whether in the exercise of the court's discretion or otherwise, when there is a plain and adequate remedy in the ordinary course of the law. (Second paragraph of the syllabus of *State, ex rel. Wesselman, v. Board of Elections of Hamilton County,* 170 Ohio St. 30, is overruled, and any decision or opinion of this court or any part thereof that is in conflict with the foregoing principle of law is disapproved.)
2. Where a zoning ordinance is unconstitutional to the extent that it is applied to prohibit a proposed use of

certain property and where a building commissioner denies an application for a building permit because that proposed use of that property is prohibited by that zoning ordinance and the owner of the property duly exhausts his administrative remedies by an unsuccessful appeal to the Board of Zoning Appeals, an appeal to the Common Pleas Court pursuant to Chapter 2506, Revised Code, from the final order of the Board of Zoning Appeals will provide the owner of the property with a plain and adequate remedy to prevent the unconstitutional application of the zoning ordinance as a basis for refusing the building permit.

The Sibarco Corporation (hereinafter referred to as Sibarco) has title or contract rights to certain properties located at a point where Henry Street, Westbridge Drive, Prospect Street and West Bridge Street intersect in the city of Berea. The land is zoned for single-family dwellings (1-A-1) and apartments or hotels (2-A). Sibarco desires to construct a gasoline station on this land. In order to secure favorable zoning provisions for such construction, Sibarco petitioned the Planning Commission and the Council of the city of Berea for an amendment to the zoning ordinance, but was unsuccessful. Sibarco then formally applied for a building permit to erect a gasoline station on the above properties. Building Commisisoner McDonald denied the application. An appeal was taken to the Board of Zoning Appeals which affirmed the commissioner's denial.

Sibarco, together with Walter E. Mischnick, (who owned certain of the aforementioned properties to which Sibarco had a contract right of purchase), instituted an action in mandamus invoking the original jurisdiction of the Court of Appeals for Cuyahoga County against the city of Berea and Building Commissioner McDonald, seeking an order commanding the appellants to issue the build-

ing permit to relators. The Court of Appeals heard the case on the merits and allowed the writ to issue. Appellants appeal, as a matter of right, to this court.

Mr. Sanford W. Likover, for appellees.

Mr. John D. Munkacsy, director of law, *Messrs. Squire, Sanders & Dempsey* and *Mr. James A. Smith,* for appellants.

HERBERT, J. Appellants contend that the Court of Appeals exceeded the original jurisdiction conferred upon it by the Constitution of Ohio, Section 6, Article IV, when it allowed the extraordinary writ of mandamus to issue although relators had available a plain and adequate remedy in the ordinary course of law by way of appeal pursuant to Chapter 2506 of the Revised Code.

The decisions of the Supreme Court have been quite inconsistent and conflicting in recent years when endeavoring to determine the proper use of mandamus in the exercise of the original jurisdiction conferred upon this court and the Court of Appeals by Sections 2 and 6, Article IV of the Ohio Constitution.

A few of such cases may well be noted.

In the Matter of Turner (1832), 5 Ohio 542, the court, in its opinion, at page 543, had the following to say:

> " 'The original nature of the writ,' as is said in 3 Burrows, 1267, 'and the end for which it was formed, direct on what occasion it shall be used. It was introduced to prevent disorder, from a failure of justice, or a defect of police; therefore, it ought to be used upon all occasions, where the law has established *no specific remedy,* and where in justice and good government, there ought to be one.' " (Emphasis added.)

The court, in its opinion, in *Cincinnati, Wilmington & Zanesville R. R. Co. v. Commrs. of Clinton County* (1852), 1 Ohio St. 77, at page 105, said:

> "It is now too well settled to require reference to authorities, that this writ [mandamus] lies in all cases, where the relator has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and *no other adequate, specific remedy.*" (Emphasis added.)

In *State, ex rel. Juhlman, v. Conners et al.* (1930), 122 Ohio St. 355, the court said, in a *per curiam* opinion, at page 358:

> "The writ of mandamus is an extraordinary writ, and will not be issued as a substitute for an existing, adequate, and available remedy in equity or in law, but only where such remedy, in equity or in law, does not exist, is not adequate, or is not available."

The syllabus in *State, ex rel. Sibarco Corp., v. Hicks, Bldg. Inspr.* (1964), 177 Ohio St. 81, reads:

> "By reason of Section 2731.05, Revised Code, enacted pursuant to Section 4, Article IV, Ohio Constitution, it is error for the Common Pleas Court to issue a writ of mandamus in those cases where there is a plain and adequate remedy in the ordinary course of the law."

A contrary view permitting the exercise of discretion in the issuance of the writ is expressed in the following cases:

The second paragraph of the syllabus in *State, ex rel. Wesselman, v. Board of Elections of Hamilton County* (1959), 170 Ohio St. 30, reads:

> "A Court of Appeals that allows a writ of mandamus to a relator does not thereby abuse its discretion *merely because such realtor also has an adequate remedy in the ordinary course of the law.*" (Emphasis added.)

In *State, ex rel. Spiccia, v. Abate, Bldg. Commr.* (1965), 2 Ohio St. 2d 129, in the opinion, at page 130, the court says:

> "The appellants' argument that the relief was improperly granted because the relator had an adequate remedy at law ignores the often stated proposition that the Court of Appeals has discretion to issue the writ of mandamus, *although there exists a plain and adequate remedy at law. * * * This court will not interfere with exercise of such discretion by that court.*" (Emphasis added.)

The following cases also support the principle of law that the Supreme Court and the Court of Appeals, in the exercise of their original jurisdiction in mandamus, *have no discretion* to issue a writ of mandamus where the relator has or had available a clear, plain and adequate remedy in the ordinary course of the law: *State, ex rel. Tax Comm. of Ohio, v. Mills, Aud.*, 103 Ohio St. 172; *State, ex rel. Bassichis, v. Zangerle, Aud.*, 126 Ohio St. 118; *State, ex rel. Podley, v. Indus. Comm.*, 127 Ohio St. 583; *State, ex rel. Hile, v. Zangerle, Aud.*, 132 Ohio St. 523; *State, ex rel. Ward, v. Kennedy, Secy. of State*, 134 Ohio St. 348; *State, ex rel. Gladman, v. Indus. Comm.*, 136 Ohio St. 90; *State, ex rel. McCamey, v. Court of Common Pleas of Cuyahoga County*, 141 Ohio St. 610; *State, ex rel. Horvitz Co., v. Souers, Dir.*, 142 Ohio St. 591; *Gannon v. Gallagher, Dir.*, 145 Ohio St. 170; *State, ex rel. Stanley, v. Cook, Supt. of Banks*, 146 Ohio St. 348, paragraph three of the syllabus; *Freon v. Carriage Co.*, 42 Ohio St. 30; *State, ex rel., v. Carpenter*, 51 Ohio St. 83; *State, ex rel. White, v. City of Cleveland*, 132 Ohio St. 111, paragraph one of the syllabus; *State, ex rel. First National Bank, v. Village of Botkins*, 141 Ohio St. 437, paragraph one of the syllabus; *State, ex rel. Shively, v. Nicholas,*

Judge, 151 Ohio St. 179, 181; *State, ex rel. City of Cincinnati, v. Miller et al., Public Utilities Comm.*, 149 Ohio St. 45; *State, ex rel. Welker, v. Indus. Comm.*, 150 Ohio St. 464; *State, ex rel. Hipperla, v. Glander, Tax Commr.*, 160 Ohio St. 59; *State, ex rel. Adams, v. Rockwell et al., Board of Edn.*, 167 Ohio St. 15; *State, ex rel. Schafer, v. Citizens National Bank of Ironton*, 168 Ohio St. 535; *State, ex rel. Lotz, v. Hover, Pros. Atty.*, 174 Ohio St. 68, 72; *State, ex rel. Emmich, dba. Modern Launderers & Dry Cleaners, v. Indus. Comm.*, 148 Ohio St. 658; *Shelby v. Hoffman*, 7 Ohio St. 451, 455, 456; and *State, ex rel. Lorain County Savings & Trust Co., v. Board of County Commrs.*, 171 Ohio St. 306.

Nevertheless, in spite of the array of authorities to the contrary, the following cases approve the exercise of discretion by the appellate court to issue or deny the writ. *State, ex rel. Wesselman, v. Board of Elections of Hamilton County, supra; State, ex rel. Feighan, v. Green et al., Board of Elections*, 171 Ohio St. 263; *State, ex rel. Spiccia, v. Abate, Bldg. Commr., supra; State ex rel. Grant, Exr., v. Kiefaber et al., Montgomery County Planning Comm.*, 171 Ohio St. 326; *State, ex rel. Fredrix, v. Village of Beachwood*, 171 Ohio St. 343; *State, ex rel. Coury, v. Ohio Bell Telephone Co.*, 172 Ohio St. 309; *State, ex rel. Moran, v. Welling, Dir.*, 172 Ohio St. 516; *State, ex rel. Roger J. Au & Son, Inc., v. Studebaker et al., Commrs.*, 175 Ohio St. 222; and *State, ex rel. Libbey-Owens-Ford Glass Co., v. Indus. Comm.*, 162 Ohio St. 302.

The proposition advanced in *Spiccia, supra* (2 Ohio St. 2d 129), that "this court will not interfere with the exercise of such discretion [to issue the writ] by that court [Court of Appeals]" appears to be in conflict with the constitutional grant of the power of review to the Supreme Court.

Section 2, Article IV of the Ohio Constitution, provides:

> "It [Supreme Court] shall have * * * appellate jurisdiction * * * in cases which originated in the Courts of Appeals * * *."

Spiccia, supra, originated in the Court of Appeals in the exercise of that court's original jurisdiction; consequently, its judgment, whether entered in the exercise of discretion or otherwise, is subject to review by the Supreme Court.

Furthermore, the *Spiccia* doctrine may be repugnant to the provisions of the Constitution providing for the certification of conflicting judgments of two Courts of Appeals. Section 6, Article IV of the Ohio Constitution.

Therefore, the second paragraph of the syllabus in the case of *State, ex rel. Wesselman, v. Board of Elections of Hamilton County,* 170 Ohio St. 30, is overruled. That portion of the case of *State, ex rel. Spiccia, v. Abate, Bldg., Commr.,* 2 Ohio St. 2d 129, denying appellate jurisdiction of the Supreme Court to review an exercise of discretion by the Court of Appeals, is disapproved.

All decisions or pronouncements of this court contrary to the principle that a writ in mandamus must not issue, where there is a plain and adequate remedy in the ordinary course of the law, are either overruled or disapproved.

"The writ of mandamus *must not be issued* when there is a plain and adequate remedy in the ordinary course of the law." Section 2731.05 of the Revised Code. The principle of law set out in this section of the Revised Code is a restatement of the common law and predecessor statutes since Ohio became a state. This principle adds stability, certainty and clarity in the exercise of original jurisdiction by the Supreme Court and the Courts of Appeals.

It removes doubt from the mind of the trial lawyer in his choice of a forum in which to bring his action, where mandamus may or may not be his remedy.

Chapter 2506, Revised Code, provided a plain and adequate remedy to appeal from the refusal of the building commissioner (which refusal was affirmed on appeal by the Board of Zoning Appeals) to issue the building permit, notwithstanding that the zoning ordinance prohibited the use sought and that the council of Berea had refused to amend the zoning ordinance to permit such use prior to the application for the building permit. That chapter was enacted by the General Assembly largely to accommodate adequately the growing volume of zoning and building litigation confronting our courts and arising from adversary proceedings in respect to the interpretation and administration of urban and rural zoning and building ordinances.

At first glance, a conflict seemingly exists between the foregoing conclusion and the recent decision of this court in *Tuber v. Perkins,* 6 Ohio St. 2d 155. However, there is a crucial distinction between the situation there and the instant one. In *Tuber,* an appeal from a zoning reclassification by a township board was instituted prior to the application for issuance of a building permit pursuant to the zone change, and thus, prior to the time the appellants' rights were adversely affected by that zone change. Hence, the attempted appeal solely from the legislative action was voided by this court.

In this case, after its request to the council of Berea was rejected, appellant pursued its objective to the executive branch of the city government by requesting a building permit. It followed the rejection of that request by an administrative appeal to the Board of Zoning Appeals. At this point, Chapter 2506, Revised Code, provided a plain

and adequate remedy to review the board's affirmance of the denial of the building permit, by appeal to the Common Pleas Court. On such appeal, the appellant could have contended, as it did in the Court of Appeals, that the zoning ordinance was unconstitutional to the extent of prohibiting its proposed use of its property. If it is right in that contention, the Common Pleas Court could have provided appellant with all of the relief that it sought in its mandamus action.

The relator, in building permit zoning litigation, is almost invariably a property owner who is seeking to increase the value of his realty and is obstructed by provisions of a zoning law or ordinance. His interest is private, as opposed to the interest of an agency of the government. The Constitution of Ohio encourages the right of property owners in "acquiring, possessing, and protecting property." Section 1, Article I of the Constitution of Ohio. However, Taft, C. J., in his concurring opinion endeavors to draw a distinction in actions in mandamus between the enforcement and protection of public interests on the one hand and private interests on the other—a distinction to which the writer of this opinion does not subscribe.

State, ex rel. Allied Wheel Products, Inc., v. Indus. Comm., 161 Ohio St. 555; *State, ex rel. D. L. Auld Co., Inc., v. Morse et al., Indus. Comm.*, 161 Ohio St. 561; and *State, ex rel. Libbey-Owens-Ford Glass Co., v. Indus. Comm.*, 162 Ohio St. 302, tend to deny the property owner his right to invoke the original jurisdiction of this court or Courts of Appeals on the ground that purely private interests are involved. That relator's interests are private is not doubted but it is certainly true that our whole national economy is built largely upon private interests, initiative and enterprise.

The rule announced in the last three cases above mentioned is in conflict with the provisions set out in the last sentence of Section 2, Article IV of the Constitution of Ohio, which reads:

> "No law shall be passed or rule made whereby *any person* shall be prevented from invoking the original jurisdiction of the Supreme Court." (Emphasis added.)

The origin of this amendment to the Constitution was occasioned by a "rule of practice" of the Supreme Court to refer cases seeking a writ of mandamus to the Circuit Court (predecessor of the Courts of Appeals) for determination. *State, ex rel. Werden, v. Williams, Twp. Clerk,* 26 Ohio St. 170.

The constitutional amendment is in clear unambiguous language. The rule suggested in *Allied Wheel, supra,* and *Glass Co., supra,* is precisely the rule in effect in *Werden, supra,* and is in direct conflict with the constitutional amendment above quoted. This amendment was adopted by the people in 1912 to terminate this "rule of practice" by the Supreme Court referred to in *Werden, supra.*

There being available to the relator a plain adequate remedy in the ordinary course of the law, the judgment of the Court of Appeals is reversed and the cause remanded to that court with instructions to deny the writ of mandamus.

Judgment reversed.

SCHNEIDER and BROWN, JJ., concur.

TAFT, C. J., concurs except as indicated in his concurring opinion.

MATTHIAS, J., concurs in paragraph one of the syllabus but dissents from the judgment.

ZIMMERMAN and O'NEILL, JJ., dissent.

TAFT, C. J., concurring. I concur since paragraph one of the syllabus will necessarily be limited to a case such as this involving the enforcement or protection of other than public rights but I believe that the portion of the majority opinion beginning with mention of *State, ex rel. Allied Wheel Prod., Inc., v. Industrial Commission*, 161 Ohio St. 555, 120 N. E. 2d 421, does not relate to any question being passed upon by the court in deciding the instant case.

Paragraph two of the syllabus of *State, ex rel. Wesselman, v. Board of Elections of Hamilton County* (1959), 170 Ohio St. 30, 162 N. E. 2d 118, represents an effort by this court to reconcile the conflict between its decision in *State, ex rel. Selected Properties, Inc., v. Gottfried* (1955), 163 Ohio St. 469, 127 N. E. 2d 371, and its decision in and paragraph two of the syllabus of *State, ex rel. Libbey-Owens-Ford Glass Co., v. Industrial Commission* (1954), 162 Ohio St. 302, 123 N. E. 2d 23.

Probably, it would have been better to choose between those two decisions rather than to endeavor to so reconcile them. As I see it, the decision in the instant case probably disapproves of the parts of the decisions in the *Selected Properties case* and in *State, ex rel. Killeen Realty Co., v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N. E. 2d 1, that are inconsistent with paragraph two of the syllabus of the *Libbey-Owens-Ford case* and with paragraph one of the syllabus of the instant case. Also, it seems to me that not only *State, ex rel. Spiccia, v. Abate, Bldg. Commr.* (1965), 2 Ohio St. 2d 129, 207 N. E. 2d 234, but also the decisions in *State, ex rel. Feighan, v. Green et al., Bd. of Elections* (1960), 171 Ohio St. 263, 169 N. E. 2d 551, and *State, ex rel. Shoeman, v. Deuber* (1963), 175 Ohio St. 357, 358, 195 N. E. 2d 110, and certain dicta in *State, ex rel. Lorain County Savings & Trust Co., v. Board of County*

Commrs. of Lorain County (1960), 171 Ohio St. 306, 170 N. E. 2d 733, and *State, ex rel. Grant, Exr., v. Kiefaber et al., Montgomery County Planning Comm.* (1960), 171 Ohio St. 326, 170 N. E. 2d 848, are inconsistent with our conclusions in the instant case.

It is not necessary to consider whether paragraph two of the syllabus of *State, ex rel. Wesselman, v. Board of Elections of Hamilton County, supra* (170 Ohio St. 30), may represent a correct statement of law in a case such as that, which involved primarily the enforcement or protection of public rights.

ZIMMERMAN, J., dissents for the reason that in his opinion Courts of Appeals should be permitted to exercise discretion in entertaining or refusing mandamus actions, even where statutory appeals might exist and private rights are involved. There are instances where mandamus would be an appropriate and expeditious manner in which to proceed. The holding of the majority of the court herein represents a clear departure from former decisions of this court. See the *per curiam* opinion in *State, ex rel. Shoeman, v. Deuber et al., Barberton Civil Service Comm.*, 175 Ohio St. 357, 358, 195 N. E. 2d 110, 111, and the cases cited therein.

O'NEILL, J., concurs in the foregoing opinion.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

(July 6, 1966.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and cause remanded to that court with instructions to deny the writ of mandamus.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING MOTION FOR REHEARING.

(September 28, 1966.)

It is ordered by the court that rehearing in this case is denied.

CONSTITUTION OF OHIO, ARTICLE IV, SECTION 6.

6. The Appellate Courts.

* * * * *

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of

appeals within the district, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to the court. * * *

AMENDMENT XIV, UNITED STATES CONSTITUTION.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE.

2505.07. Time for perfecting appeal.

After the journal entry of a final order, judgment or decree has been approved by the court in writing and filed with the clerk for journalization, or after the entry of other matter for review, the period of time with which the appeal shall be perfected, unless otherwise provided by law, is as follows:

* * * * *

(B) All other appeals shall be perfected within ten days.

* * * * *

713.11. Administrative board; powers and duties.

The legislative authority of a municipal corporation may create an administrative board to administer the details of the application of the regulations under section 713.06 to 713.12, inclusive, of the Revised Code, and may delegate to such board, in accordance with general rules and regulations to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations, and to administer the regulations as specified therein. Such administrative powers and functions may be delegated by the legislative authority to the planning commission or board.